Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 76-349

HAROLD J. GARMANY, *Petitioner*

versus

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PERCY FOREMAN
512 First National Life Building
Houston, Texas 77002
(713) 224-9321
Counsel for Petitioner

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

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Petitioner in the above styled and numbered cause respectfully prays that a writ of certiorari issue to review an opinion and judgment of the United States Court of Appeals for the Fifth Circuit, entered on July 6, 1976, which affirmed his conviction of the offense of conspiracy to possess marihuana with intent to distribute it.

THE OPINION BELOW

The Court of Appeals made summary disposition, without written opinion, of Petitioner's appeal in that Court.

JURISDICTION

Judgment of conviction against Petitioner was entered by the District Court on November 24, 1975 and affirmed by the Court of Appeals on July 6, 1976. Petitioner's motion for rehearing in that Court was denied on August 9, 1976.

Petitioner invokes this Court's certiorari jurisdiction conferred by 28 U.S.C. Sec. 1254 (1). Filing of this petition was accomplished within 30 days from date of entry of order of the Court of Appeals denying the motion for rehearing and therefore was timely.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the Fourth Amendment and the Due Process Clause of the Fifth Amendment.

QUESTION PRESENTED FOR REVIEW

Whether the effect of the affirmance by the Court of Appeals was to decide, in a way in conflict with the decision of this Court in *Preston v. United States,* 376 U.S. 364 (1964), the federal question whether Petitioner's Fourth Amendment rights were violated by the trial court's overruling Petitioner's motion to suppress and admitting into evidence the incriminating fruits yielded by the warrantless search which federal officers made of the flight bag they took from the trunk of Petitioner's rented car at a time when both he and the car were in the custody and control of the officers at the D.E.A. office and at a time when the officers had no probable cause for belief that contraband was in the trunk of the car or in any bag in the trunk of the car.

STATEMENT OF THE CASE

Co-defendants Brown and Bravo were observed by federal officers making a transfer of marihuana from an Oldsmobile driven by Bravo to a trailer. After the transfer was completed the officers arrested Brown and Bravo. At the same time they also arrested Petitioner, who was about 50 feet away standing in front of a motel by the side of a car he had rented. Shortly before the transfer of marihuana was effected Brown had been a passenger in that car.

The officers took the rented car to the D.E.A. office. They also took Petitioner there. Thereafter, at a time when both he and the car were in custody the officers made a warrantless search of the trunk of the car and of a flight bag they found therein. In the flight bag they found a note (Gov. Exhibit #19) which indicated circumstantially that Petitioner had been dealing in marihuana (R. 238, 409).

REASONS FOR GRANTING THE WRIT

The evidence shows, without dispute, that the incriminating note the officers found in the flight bag was fruit of a warrantless search they made of that bag after they removed it from the trunk of the rented car following their driving that car to the D.E.A. office. The evidence also shows, without dispute, that the officers had no probable cause for belief that contraband or weapons were in the trunk of the rented car or in a flight bag found in that trunk. The evidence also shows, without dispute, that the rented car was not subject to seizure and forfeiture, there being no marihuana or other contraband shown by the evidence to have been connected with that car.

The existence of these undisputed facts operates to distinguish and make inapplicable the cases the trial court relied on as basis for overruling the motion to suppress which Petitioner urged and the trial court overruled (R. 207-231), such cases being as follows: *Harris v. United States,* 390 U.S. 234 (1968); *Cooper v. California,* 386 U.S. 58 (1967); *United States v. Soriano,* 497 F.2d 147 (5th Cir. 1974); and *United States v. Davis,* 496 F.2d 1026 (5th Cir. 1974).

Such undisputed facts operate instead to make applicable in Petitioner's favor the decision of this Court rendered in *Preston v. United States,* 376 U.S. 364 (1964). In that case officers after arresting defendants and taking them to the police station, towed their car to the police garage and there subjected it to warrantless search despite the fact the officers had no probable cause for belief that the car contained contraband. This Court concluded that the search was too remote in time and place to have been made as incidental to the arrest and could not otherwise be justified as being reasonable under the Fourth Amendment. The principle applied by this Court in arriving at that conclusion applies equally as basis for a similar conclusion here.

Wherefore, premises considered, Petitioner respectfully submits that the effect of the affirmance by the Court of Appeals was to decide, in a way in conflict with the decision of this Court in *Preston,* the federal question whether Petitioner's Fourth Amendment rights were violated by the trial court ruling overruling the motion to suppress and admitting into evidence the incriminating fruits yielded by the warrantless search the officers made of the flight bag they took from the trunk of Petitioner's rented car at a time when both he and the car were in the custody and control of the officers at the D.E.A. office.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Percy Foreman

PERCY FOREMAN
512 First National Life Building
Houston, Texas 77002
(713) 224-9321
Attorney for Harold J. Garmany

CERTIFICATE OF SERVICE

I certify that, as required by Rule 33, as amended, I have duly served the foregoing Petition for Certiorari by mailing, with first class airmail postage prepaid, three printed copies of such petition to the Solicitor General, Department of Justice, Washington, D.C., 20520, and three printed copies of such petition to Hon. James R. Gough, Assistant U.S. Attorney, P.O. Box 61129, Houston, Texas 77208, on this the 26th day of August, 1976.

Percy Foreman

PERCY FOREMAN

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 75-4457

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

HAROLD JERRY GARMANY,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING

(August 9, 1976)

Before BROWN, Chief Judge, GEWIN and MORGAN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 75-4457
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

HAROLD J. GARMANY,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

(July 6, 1976)

BEFORE BROWN, Chief Judge, GEWIN and MORGAN, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

Issued as Mandate: August 17, 1976

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* Rule 18, 5 Cir., see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir., 1970, 431 F.2d 409 Part I

1. See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-349

HAROLD J. GARMANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court erred in denying his motion to suppress a document found by a Drug Enforcement Administration agent during a search of the contents of a flight bag that had been taken by the agent, at petitioner's request, from petitioner's rented car after his arrest.

After a jury trial in the United States District Court for the Southern District of Texas, petitioner and co-defendants Woodrow Brown and David Bravo were convicted of conspiracy to possess marihuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 846.[1] Petitioner was sentenced to five years' imprisonment, followed by a special parole term of three years,

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[1]Co-defendants Brown and Bravo were also convicted of possession of marihuana with intent to distribute it. Co-defendants Guadalupe Molina and Patsy Molina were acquitted.

and was fined $5,000. The court of appeals affirmed without opinion (Pet. App. B) and denied a petition for rehearing (Pet. App. A).

1. The evidence showed that on May 29 and 30, 1975, Agent Kenneth Moore of the Drug Enforcement Administration was told by a reliable informant that a man named Brown, who was staying at the Quality Inn Motel in Pharr, Texas, was attempting to negotiate a marihuana transaction and that Brown was using a Kenworth truck and trailer with a stated license number. After Agent Moore ascertained that Woodrow Brown was occupying Room 148 at the motel and was driving a Kenworth truck having the described license number and trailer, he began a surveillance (Tr. 46-48).

On the afternoon of June 1, 1975, co-defendants Guadalupe and Patsy Molina arrived at the motel in an Oldsmobile registered to Mrs. Molina and visited Room 148 for about ten minutes (Tr. 50-52, 259). Visits to Room 148 were also made on that day by a person driving a Gremlin, who was later identified as defendant Bravo (Tr. 51, 59-60, 260, 262), and by another person driving a Pontiac LeMans (Tr. 260). That evening, Agents Moore and Wayne Wilkins looked through a ventilating door at the rear of the Kenworth truck, which was parked next to Room 148, saw three burlap bags (containing what appeared to be bricks) and detected the odor of marihuana (Tr. 52, 260-261).

On the afternoon of June 2, 1975, a person driving a rented Pontiac Grand Prix arrived at the motel and visited Room 148. At about 10:00 p.m., the Kenworth truck and trailer were moved to a gasoline station in McAllen, Texas, and the Gremlin and Grand Prix were also moved to that location (Tr. 61-62, 263). Early in

the morning of June 3, the truck and trailer were moved once again, this time to a parking lot behind a Ramada Inn (Tr. 62-63; 263-264). At about 7:30 a.m., petitioner, driving the rented Grand Prix and accompanied by Brown, arrived at the Ramada Inn and parked about fifty feet from the truck-trailer. Petitioner raised the hood on his vehicle, walked over to the truck-trailer, returned to his vehicle, and stood beside the car, looking around the area. Brown then left the Grand Prix and opened up the trailer (Tr. 264-265). Shortly thereafter, Bravo arrived in Mrs. Molina's Oldsmobile, entered the trailer, and started handing out burlap sacks to Brown, who loaded them into the Oldsmobile. At this point, Drug Enforcement Administration agents moved in and arrested Brown, Bravo, and petitioner. In a false compartment of the Oldsmobile the agents found burlap sacks containing 617 pounds of marihuana (Tr. 32-39, 41, 265-273).

After petitioner's arrest, he drove in the rented Grand Prix with an agent to the Drug Enforcement Administration office. Before petitioner entered the office, he stated that he had some belongings in the trunk of the car. The agent, in petitioner's presence, then opened the trunk and removed some luggage, including a flight bag, and carried it into the office, where it was searched. Among the items found in the flight bag was a note (G.X. 19), the meaning of which was not clear on its face, bearing the figures "$3,360" and "32 pounds" (Tr. 207-208, 238). In addition, the agents found $12,000 in cash in a plastic bag being carried by petitioner (Tr. 69-70).

Petitioner did not move prior to trial to suppress this evidence. During trial, however, the district court held a hearing, out of the jury's presence, on petitioner's motion to suppress the note (Tr. 11, 72, 207-228). The court then denied the motion, holding that the agents had probable cause to arrest petitioner and to search the

car and the flight bag found therein (Tr. 226-227). Moreover, the court found that petitioner had specifically asked to have his belongings taken from the trunk of the car and had claimed the flight bag as his own.

After admission of the document, an agent testified that petitioner had stated following his arrest that the entry on the note related to his purchase of meat (Tr. 237-238). Although petitioner did not testify in his own defense, his only witness, Charles Roe, testified that the note referred to the price of a truckload of berries or lettuce and was not in petitioner's handwriting (Tr. 409-410). The government contended in its closing argument that the note evidenced a marihuana transaction (Tr. 454), and the conflicting interpretations were summarized in the court's instructions to the jury (Tr. 520).

2. Petitioner contends (Pet. 4) that the ambiguous note found by the agents when the contents of his flight bag were examined after his arrest was seized in violation of the Fourth Amendment, as interpreted in *Preston* v. *United States*, 376 U.S. 364. *Preston*, however, involved the warrantless search of an automobile, following the arrest of its driver and passengers for vagrancy, in the absence of probable cause to believe that it contained evidence of a crime. The Court held that the search was "too remote in time or place to have been made as incidental to the arrest" (*id.* at 368), which was the sole justification offered to support the search.

By contrast, as the district court found (Tr. 226), the agents in this case had probable cause to believe that the rented automobile driven by petitioner at the time of his arrest contained evidence of the illegal drug transactions. The search and seizure of the items found in the trunk of the car immediately after it had been brought to the Drug Enforcement Administration office

and after petitioner had expressly requested that his flight bag be removed was therefore reasonable.[2] See *Texas* v. *White*, 423 U.S. 67; *Chambers* v. *Maroney*, 399 U.S. 42. See also *United States* v. *Friesen*, C.A. 9, No. 75-1799, decided November 12, 1976; *United States* v. *Zaicek*, 519 F. 2d 412 (C.A. 2); *United States* v. *Soriano*, 497 F. 2d 147 (C.A. 5) (*en banc*).[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1976.

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[2]The search of the flight bag after it had been removed from the trunk at petitioner's request was also justified in the circumstances of this case by the need to inventory the belongings of a person validly under arrest (Tr. 226). See *South Dakota* v. *Opperman*, No. 75-76, decided July 6, 1976.

[3]Petition for a writ of certiorari from affirmance of judgment of conviction (C.A. 5, No. 75-4264, June 30, 1976) pending *sub nom. Aviles* v. *United States*, No. 76-5132.

DOJ-1976-12